Bay Control Services, Inc., an Operating Division of Bay, Inc. *and* International Brotherhood of Electrical Workers, Local 479, AFL–CIO

Bay, Inc. *and* International Brotherhood of Electrical Workers, Local 479, AFL–CIO. Cases 16–CA–15939 and 16–CA–16068

September 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 30, 1994, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent Bay Control Services filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's findings that Respondent Bay Control Services (BCS) did not, as alleged, violate Sec. 8(a)(3) of the Act by refusing to hire members of Electrical Workers Local 479 who applied for work on December 22, 1992, and January 6, 1993, we stress that, as the judge found, there was no showing that there were jobs available for new hires on those dates. Thus, although BCS at other times did hire some applicants who, like the union members here, appeared at the jobsite seeking work, the General Counsel has failed to establish that BCS needed employees on the specific days that the union members sought work. Furthermore, BCS' primary employment need on the project was to fill low-paying helper jobs and BCS had a policy, based on past experience, against hiring overqualified employees such as the journeymen electricians alleged as discriminatees here. However, in dismissing this allegation, Members Stephens and Devaney do not rely on the judge's speculative comments that the union members who applied for work were not bona fide job applicants, his finding that these applicants placed an unacceptable condition on BCS by requiring that they be promoted from helper to journeyman status as soon as possible, or his reference to and reliance on *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 (4th Cir. 1994).

Robert G. Levy, Esq., for the General Counsel.
Neil Martin, Esq. (Gardere & Wynne), of Houston, Texas, for the Respondents.
Larry M. Moore, Organizer, International Brotherhood of Electrical Workers, Local 479, AFL–CIO, of Beaumont, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Port Arthur, Texas, on October 26 and 27, 1993, on a consolidated complaint issued by the Regional Director for Region 16 on June 2, 1993.[1] The complaint is based on unfair labor practice charges filed on January 22 and April 20, respectively, by International Brotherhood of Electrical Workers, Local 479, AFL–CIO (the Charging Party, the IBEW, or the Union). The first charge was subsequently amended. A consolidated complaint alleges that Bay Control Services, Inc. (BCS), an Operating Division of Bay, Inc. (Bay, Inc.) and Bay, Inc. itself have engaged in certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

Issues

There are two principal issues to be decided. The first, is whether these two construction firms have refused to hire members of or sympathizers with the Union. Specifically, BCS is accused of refusing to hire approximately 75 union members because of their union membership. The complaint asserts that these 75 applied for work on November 9–10, 1992, and that several of them on two subsequent occasions attempted to obtain employment but were again denied. The second issue is whether Bay, Inc., in February 1993, refused to hire an individual named Susan Duhon as a timekeeper because her husband was a member of the Union. Connected to that incident is a question of whether one of the persons involved in interviewing her unlawfully asked her whether she would be willing to cross a picket line and whether her husband was a union member.

Both Companies deny committing the alleged unfair labor practices. With respect to the union craftsmen who applied for work in November and subsequently Respondent BCS asserts that it was not hiring individuals with those skills and in any event had no openings. With respect to Duhon, Respondent Bay, Inc. asserts it did not ask about her husband's union membership and the question regarding whether she would cross the picket line was not coercive under the circumstances presented. Specifically, it notes that the pickets had engaged in misconduct sufficient to notify any employee that safety was a consideration in his or her decision to become or remain employed. Second, it contends Duhon was not selected for the position, because she was not the most qualified applicant. It further asserts that it has a demonstrated hiring policy which is neutral and which in fact has resulted in the employment of known union members or employees whose spouses are union members.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue, and to file briefs. The General Counsel and Respondent have filed briefs which have been carefully considered. Based on the entire record of the case,

[1] All dates are 1993 unless otherwise indicated.

as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint does not distinguish between BCS and Bay, Inc. It asserts they are one and the same and, accordingly, treats them as a single respondent which provides electrical construction contracting services. The evidence shows, however, that both are corporations which are part of a larger conglomerate owned by Berry Contracting, Inc. The corporate structure will be described in a little more detail infra, but it is clear that both Bay, Inc. and BCS, either individually or together, meet the Board's nonretail standard for the assertion of jurisdiction. The answer to the complaint admits that ''Respondent'' has performed services valued in excess of $50,000 for customers located outside the State of Texas. Accordingly, I find that these Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Although both Respondents denied the Union's status as a labor organization on the basis that they had insufficient knowledge to admit or deny the allegation, it is clear that the Union is a labor organization within the meaning of Section 2(5) of the Act. Its representative stated that it has approximately 700 members who actively seek work in the Beaumont/Port Arthur area. The General Counsel did not much pursue the matter, but it is not in dispute.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Both of the corporations involved here are nonunion construction firms. They are engaged in various phases of heavy industrial construction including the erection of portions of chemical plants. They are both subsidiaries of Berry Contracting, Inc., a large, heavy industrial contractor headquartered in Corpus Christi, Texas. Bay, Inc., in general, regards itself as a civil contractor, meaning that it performs a large amount of what it describes as ''mechanical'' work. BCS, on the other hand, generally regards itself as an instrumentation and electrical (I&E) subcontractor. It often performs work for Bay, Inc. However, it has the freedom to contract directly with other companies in providing its expertise. It admits that it is often considered an operating arm of Bay, Inc. Nonetheless, Bay, Inc. and BCS have separate management and are considered separate profit centers insofar as these particular companies are subsidiaries of Berry Contracting, Inc. Bay, like Berry Contracting, is headquartered in Corpus Christi. BCS has its headquarters in Houston. Berry Contracting has other incorporated divisions which are not described with any particularity in the record, although at least one other construction subsidiary, Mason Construction, was mentioned and performed work on the site.

The fact that Bay, Inc. and BCS both have different management and can contract independently of one another is of some interest here. Nonetheless, they often work together and when on a common jobsite will exchange employees as needed, charging each other for the time of the particular employee and then charging that time to the job being performed for the customer. One of the means by which they separately account for jobs and for work is to assign specific numbers to each job. These jobs are not necessarily congruent with the contracts they have signed with their customers. They do engage in internal arrangements to acquire any expertise which a sister company may be able to provide.

In this regard, the job in question is somewhat difficult to describe. Indeed, there seems to have been some public confusion about what roles Bay, Inc. and BCS were playing on the project in question, located in Port Neches, Texas. At least some individuals, including a county judge (in Texas that office is a nonjudicial one, more equivalent to a county commissioner or supervisor) described circumstances which were inaccurate hearsay. That judge's description, in some letters dealing with the project owner's tax abatement privileges, led the Union, and perhaps the General Counsel, to mistakenly conclude that Bay, Inc., was the general or the ''prime'' contractor here. However, Luther Young, Bay, Inc.'s industrial division manager, and the individual who signed the business contracts, testified that it was not. Instead, he points out that the owner of the project is North American Big Three, a manufacturer of industrial and liquid gases. It is a subsidiary of a French firm called Air Liquide. Also under the Air Liquide umbrella is a separate firm called Liquid Air Engineering, the construction arm of that manufacturing concern. Bay, Inc.'s contract, according to Young, was with Liquid Air Engineering, who signed the construction contracts with several large contractors for work on the site. Therefore, it is clear that Liquid Air Engineering, not Bay, Inc., was the ''prime'' contractor. Nonetheless, the owner and the eventual operator of the plant was North American Big Three. It is often referred to by witnesses as the ''Big Three Project.''

Although the entire project has not been described with real accuracy in the record, it appears that Liquid Air Engineering engaged a number of industrial contractors to erect a liquid oxygen manufacturing vessel and the connected buildings and control systems. It appears to have been large enough to have required its own electrical substation and a large steel building. Contractors other than the two Respondents were involved in constructing these two facilities; they were DiShields Construction and United Builders, respectively.

In late November or early December 1992, Respondent Bay, Inc. began performing certain work on Big Three's site in Port Neches. For its internal accounting purposes, it designated the job as IN-405. A portion of that job was subcontracted to Respondent BCS which designated its portion as IE-429. The IN and IE designations refer to each company's description of the type of project. IN stands for ''industrial'' and IE stands for ''instrumentation and electrical.'' BCS' IE-429 was said to be about 3 percent of Bay Inc.'s IN-405.

IE-429, despite its internal designation, was mostly a civil job. Civil work is generally regarded as involving earthmoving and site preparation. In this respect, the portion of the work which Respondent BCS was to perform involved digging a lengthy trench, which at the bottom would contain a 300-foot long rough concrete box device known as a ''duct bank.'' Among other things, a duct bank houses underground electrical conduits. Due to the sandy and unstable nature of

the soil, the trench had to be approximately 45 feet wide and approximately 7 feet deep in the center, although at some points the bottom was as much as 14 feet below the grade. The nature of the soil required an OSHA-certified excavation expert to guard against cave-ins. The soil is not only unstable, but close to sea level and subject to seepage. Once the duct bank was installed the project then required backfilling at 1-foot intervals. Moreover, the inclement weather in this east Texas location often interferes with construction. It is fair to say that such a trench would, in wet weather, become unworkable and delay the project until the trench dried out. It was tedious and time-consuming work.[2]

The duct bank component of IE-429 involved an average of eight workers. In addition, BCS had two administrative employees and, later, several individuals who were assigned to the instrument portion of the project, principally dealing with the three ''cold boxes.''[3] The cold box work did not commence until months after the conduct alleged to be unfair labor practices. BCS' Wolfe said that portion had not begun by the time he left the site in late May for another job.

BCS' presence on the site, performing the duct bank work, was a bit unusual for it. It normally does not do civil work. In addition, the construction of the duct bank itself, i.e., the concrete form fabrication, the rebar installation therein and the concrete placement is not work that BCS usually performs. It is more likely to be involved in instrumentation and industrial electrical contracting. Only a small portion of this job, approximately 10 percent, involved what might be described as electrical, the installation of empty conduit within the duct bank. That was very simple work, requiring a worker to insert lengths of plastic conduit throughout the 300-foot length of the duct bank framework. At one end of the structure, the conduit turned upwards and was ''stubbed'' out. None of BCS' work involved the pulling of cable or wire through the conduit itself. The entire project was relatively small, scheduled for only a few months,[4] and was below ground. The last observation, that it was below ground is of significance as will be seen infra.

BCS' Hupe explained that the principal reason Bay, Inc. had put BCS on the site was in order to ''establish a presence'' with Liquid Air Engineering to increase the likelihood that it could successfully bid, together with Bay, Inc., on the succeeding portion of the project, the so-called aboveground work. That work would have involved the hiring of a substantial number of electricians. They would have pulled the wire through the underground system previously installed as well as doing all of the aboveground wiring which the plant required. All the Bay and BCS managers agreed that the aboveground work was the principal lure for the belowground bid. As will be observed, however, Liquid Air Engineering did not award the aboveground contract until approximately May 1993, and then it went to an unrelated company, SECO.

Nonetheless, in October 1992, Bay and BCS were targeting the aboveground work. Neither company was particularly familiar with the availability of skilled manpower in the Beaumont-Port Neches-Port Arthur area nor were they certain what wages they would have to pay to attract skilled workers. They both knew that IN-405 and its subsidiary IE-429 were about to begin. Those first contracts had been let a little while earlier. Nonetheless, Bay, Inc. knew that it needed workmen for its portion of IN-405. Accordingly, it decided to advertise in at least one of the local area newspapers, the Orange (Texas) Leader.[5]

The ad requested interested persons to telephone a listed number or send a resume to Bay, Inc.'s Corpus Christi headquarters. It ended by announcing that ''applications and resumes will be accepted in person at the Holiday Inn (Park Central) in Port Arthur on Monday and Tuesday, 11/9/92 and 11/10/92.''

It should first be observed that the ad specifically noted that Bay was seeking employees for a ''long-term project.'' Second, it should be observed that BCS as an employer is not mentioned in the ad at all.

With respect to the latter observation, I have taken into account the testimony of Luther Young, Bay, Inc.'s industrial division manager. He says he helped put the ad together. Others involved with the ad were Mike Roberts, Bay, Inc.'s personnel manager and, apparently, Don Dudley. Dudley, who died in mid-February 1993, was Hupe's predecessor as the division manager of BCS. The incumbent in that job is obligated, among other things, to perform bid preparation work. According to Young, Dudley asked him to include I&E (instrumentation fitters and electricians) craftpersons in the ad. The purpose, he says, was not to hire those individuals, but to allow Dudley to use the results as a survey for the purpose of determining the local availability of such craftpersons as well as to determine what wage rate he could use in preparing the bid for the aboveground work.

In essence, that meant the only jobs which were immediately available as a result of the application collections of November 9 and 10 were the office jobs. The remainder were in anticipation. However, Young clearly wished to be prepared to hire the construction people he needed for IN-405. Indeed, the evidence shows that shortly thereafter, in early December, he did use those applications for that purpose. However, Bay's IN-405 did not require the services of any persons having electrical skills.[6]

[2] The foregoing descriptions are pursuant to the testimony of BCS' division manager.

[3] The second part of IE-429 required BCS to fit a large amount of tubing and instrumentation gear to the ''cold box,'' the device which cools oxygen to the liquid state. That portion of IE-429 is of no concern to this case. The employees assigned to it were instrumentation fitters and helpers.

[4] The entire project, IE-429, including the more detailed cold box work, was originally estimated to have been completed in 5 months.

[5] It also advertised in another local newspaper the Beaumont Enterprise, but the only ad which is in evidence is the one from the Orange Leader. The November 2, 1992 issue of that newspaper contained a boxed advertisement headed with the Bay, Inc. logo. It stated: ''Bay, Inc. is currently accepting applications from qualified professionals for a long-term project in Pt. Neches area. Successful applicants will possess experience in the area applied for equal to industry standards and practice.'' It then listed openings from November 9 through the project completion for office manager, timekeeper, QX/QC material control, and planner/scheduler. It went on to list for the date November 23, 1992, through the end of the project, the following: craft foremen, operators (light and heavy), pipefitters, welders (stick, tig, alloy, and structural), millwrights, scaffold builders, electricians, instrument fitters, carpenters, and ironworkers (structural).

[6] An exception was the installation of temporary power throughout the site. Bay asked BCS to perform the work on an as-needed basis.

Moreover, when IE-429 was begun, about December 7, the I&E superintendent for BCS, an individual named Mark Auwae, brought to the site a crew which normally worked with him and which had not been part of the November 9 interviews. The complaint does not assert that Auwae's decision to hire the crew with whom he normally worked is in any way discriminatory. His crew included a foreman, Chesser, two electricians, Forsyth and Cloud, and helpers.[7]

B. *The Holiday Inn Applications*

The Union had, of course, seen Bay, Inc.'s ad in the Orange Leader. Using that tip, it decided to attempt to persuade Bay, Inc. to hire its members. Accordingly, on November 9–10 it rented a room at the Holiday Inn next to the room which Roberts and Young were using. Over the course of the 2 days, they took between 300 and 400 applications. Of those approximately 140 or so qualified as I&E applications. Of the 140 approximately 75 were routed to Respondents by the IBEW.[8]

Roberts testified that he later segregated the applications which he had obtained at the Holiday Inn into two groups. The first group contained all of the applications except for the I&E applicants. The first group was transmitted to Corpus Christi where each was reviewed and then sent back to the Bay, Inc. jobsite office in Port Neches. The second group, the instrument fitters and electricians, were also sent to Corpus Christi. They were then sent to BCS' Dudley at his office in Houston. It is undisputed that these 140 or so applications were not processed any further.

During this period Dudley became terminally ill. It quickly became apparent to upper management that Dudley would be unable to perform his duties. In December, BCS hired Hupe to replace him, though he did not actually report for work until January 4, 1993. Dudley, who was by then undergoing chemotherapy, was reassigned to other duties within the Company. He died in mid-February.

Hupe testified that he was unaware that Dudley in November had solicited applications for electricians and instrument fitters. He says he first learned that such applications had been taken when a Board agent, during the course of the investigation of this case, so informed him. Sometime after Dudley's death, the applications were found in his desk.

It is also undisputed that the Liquid Air Engineering aboveground contract was not let to either Respondent. Furthermore, it appears that although Dudley and others expected the Liquid Air Engineering plans to be available for bid analysis sometime in December 1992, they were not actually released until March 1993. Either his illness or the delay undoubtedly had caused Dudley to put the applications aside. As previously noted, the contract itself was not awarded until June 1993 and, then, to another company, SECO.

Nonetheless, it is apparent that the aboveground project which was eventually awarded to SECO would have employed about 100 persons in the electrician trade. About 30 percent would have been journeyman electricians and the remainder some sort of electrical helper. BCS estimated the job was going to last from March to September 1993, clearly qualifying as the ''long term project'' contemplated by the ad.

In contrast, IE-429 was originally considered to be a short-term project involving, little in the way of electricians' skills. Due to extensive weather setbacks and, apparently, change orders, that project, under BCS' direction had not been completed even as of the date of the hearing, late October 1993, by then focused on the tubing portion. Nonetheless, it never carried more than eight persons who actually worked on the duct bank itself.

C. *The Union's Efforts/BCS' Response*

As observed earlier, IE-429 began in early December under the direct supervision of Project Superintendent Mark Auwae. He had brought his own crew with him but did engage in a certain amount of gate hiring. He did not testify in this proceeding, and it is apparent his testimony was unnecessary. Certainly the General Counsel has not contended that the initial hiring of the crew was in any way unlawful. The Union, however, was aware that ''Bay'' was performing some work on the project. Indeed, the remainder of IN-405 (of which IE-429 was a part) began at about the same time. The Union was undoubtedly aware that individuals with skills other than those pertaining to the electrical trade were being utilized. It did not understand why its people had not been contacted. After all, at the Holiday Inn, Bay, Inc. had clearly given the impression that hiring would take place shortly. Indeed, for the most part it had.

Bay, Inc.'s personnel manager, Mike Roberts, acknowledges that the I&E applications were handled differently and that the I&E applicants probably were not told that their situation would be treated differently than the remaining employees. However, Roberts did have two conversations on that subject with the Union's organizer, Larry Moore, at the Holiday Inn.

The first conversation, Roberts says, occurred early in the application-taking process. Moore came in, introduced himself, and asked a few questions about the job. Moore advised that he had people who would be applying for the electrical portion of the work. He also asked when Bay would be hiring and how many people the Company anticipated hiring.

[7] Both Forsyth and Cloud were classified for payroll purposes as E-1 electricians. As such their hourly rate was $14 per hour. Both the testimony and a review of those records, in evidence as G.C. Exh. 7, demonstrate that payroll classification system is less than consistent. The most accurate way to determine an employee's principal job is by pay rate. In this system $14 is the highest pay for a given rank-and-file job. Lesser rates indicate a less experienced or lesser skilled employee, perhaps even a helper. Usually helpers have an ''H'' in their classification, but not always. Both helpers and the more highly skilled workers are often asked to perform tasks outside their designated field. Thus ironworker helpers and electrical helpers commonly help each other out, sometimes working side by side.

[8] It should be observed here that Roberts testified that it was Respondents' practice to require a company personnel or other official actually to witness an applicant's signature on the second page of the application. Furthermore, Roberts said that it is company practice to actually be able to interview an individual or a least talk with him or hear. He acknowledges, however, that because of the large number of applicants at the Holiday Inn, he and Young were unable to sign all the applications as witnesses. Nonetheless, Roberts said he regarded those to whom he had talked as valid applications even if they had not been formally witnessed. Many of the applications which were filed by IBEW members were in fact properly filled out and witnessed by a company official. Others were missing the back page (and therefore both the applicant's signature as well as the witness') and others were witnessed by the union officials. As will be seen, these potential defects had no bearing on how these applications were treated.

Roberts says he told Moore, ''If we did get the electrical portion of it that we anticipated getting, that we would be hiring probably in a couple of months after the ground work was done and the civil work was complete.'' Moore did not testify, and there is no evidence to the contrary.

With respect to Moore's question regarding the number of individuals Respondents expected to hire, Roberts said that he didn't have an exact answer so he simply said, ''Whenever the order came in, however many people we hire, is how many we would hire.'' Roberts went on to say that he told Moore that he was ''glad to take their [the IBEW] applications; they would be considered for employment.''

Roberts had a second, inconsequential conversation with Moore sometime during the next 2 days. He was unable to recall that conversation in any detail. He also had a third conversation as the second day drew to a close. He says on November 10, shortly before they were to close the room at the Holiday Inn, Moore came in and gave him approximately 20 applications. Roberts accepted them although he was somewhat concerned because he hadn't actually interviewed these individuals and because he didn't know for sure whether they were actually available. He had, during the course of those 2 days, taken applications from other individuals who had identified themselves as union members, the IBEW, the Pipefitters local, and the Ironworkers local. Apparently he had more confidence in the currency of those applications than he did with respect to the 20 which Moore gave him. Nonetheless, in that third conversation he did accept those which Moore proffered and answered some questions which Moore had. Specifically, he says Moore asked him how he felt about the manpower availability in the area and whether he was satisfied with the response he had gotten. Roberts replied that he was satisfied and felt comfortable with the response.

Roberts then says Moore went on to say something to the effect that Moore wanted Roberts to be aware that should the IBEW persons be hired onto the job, that the IBEW would make every effort to organize the job, not only their own craft, but also the other crafts which were working. When asked what his response to that remark was, Roberts says he told Moore ''that they were welcome to work on the job if we have jobs open. If they wanted to organize, they were welcome to try to organize the job. Of course, being an open shop contractor, we don't want to be organized, but I have worked in this area before, and it has never stopped me from hiring any type of union personnel before.''

In any event, not having heard from Respondents, on December 22, 1992, and again on January 6, 1993, Union Organizer Gene VanMeter went to the jobsite with several IBEW members.[9] On December 22, VanMeter entered the BCS trailer, accompanied by several IBEW members. There he spoke to ''Mark'' and a secretary/timekeeper. It is apparent that the Mark to whom he spoke was Mark Auwae, the I&E superintendent. He says he asked Mark if ''our applications were being considered.'' Mark replied that the applications coming from the next trailer (the Bay, Inc. trailer) were for the ''muddy ditch work.'' One of the employees who had accompanied VanMeter, Jerry Gravitt, asserted, ''We would be happy to do the ditch work.'' Mark replied that the only folks who were being hired were helpers and those only because some had failed the drug test. At that point, VanMeter stated, ''We will be willing to do that ditch work as helpers. We will be willing to hire in as helpers with the understanding that when any available openings as journeyman electricians came along, that we would be advanced to that status.''

It should be observed here that none of these applicants had previously indicated they would be willing to work as helpers; their applications were all for the job of journeyman electrician. VanMeter also says someone in his group, he does not recall who, asked Mark if the group wasn't being hired because of their union membership. He recalls Mark replied, ''No.'' VanMeter had brought with him photocopies of the applications of these individuals which had previously been delivered on March 9 or 10. Mark accepted them saying he would transmit them to the office. VanMeter says Mark told him they could expect to hear from the Employer as soon as the next day.

VanMeter says however that no one was called. On January 6 he again took a number of employees, some of whom were the same, down to the office and spoke once more to Mark. VanMeter says he asked Mark why they hadn't been called. He remembers Mark saying that he was not hiring that particular day, but he would be needing to hire because the job was running behind and there were complications on the job. VanMeter says he asked whether the applications were being held and Mark said he did not know. At that point, VanMeter again gave Mark copies of the earlier filed applications and left them with him. He says he heard Mark tell the office secretary to get a cover sheet prepared so he could fax the applications to the office in Houston. VanMeter says he once again reiterated that the electricians were prepared to go to work for him and would be happy to work and that they could do anything he had to offer.

At the hearing VanMeter acknowledged that he was not offering himself, nor were his fellows offering themselves, as individuals who were sufficiently qualified in skills other than electrical to warrant making a living in the other trades. Those trades included carpentry, rod busting (tying reinforcing steel), and operating heavy equipment. He asserts that he didn't tell Mark that he would dig ditches, only that he would work in a ditch doing electrical helper work. He does admit, however, that he conditioned his fellow electricians' offer to do the helper work on the understanding that if journeyman electrical work opened up that they would be reassigned to it. The helper jobs paid $5–$8 per hour. The IBEW-negotiated wage rate for journeymen was about $18 per hour. Respondent paid its electricians $14 per hour.

When VanMeter was asked why, as a journeyman electrical worker, he was willing to work for less than half his regular wage rate (the helper rate), he stated rather unsatisfyingly, ''Because it was just something I wanted to do at the time.'' When counsel asked him for a further explanation he replied, ''I don't have one to offer you, sir.''

[9] VanMeter himself had filled out a job application at the Holiday Inn. It would appear that his is 1 of the 20 which Moore gave to Roberts on November 10. I reach that conclusion because VanMeter's application has the signature of Daniel Hetzel as the witness. Hetzel is another union organizer and is not employed by Respondent.

The foregoing description deals with the Union's effort to shift the applications from ''journeyman electrician''[10] applications to becoming helper applications. While there is some question, discussed below, whether that was proper, I do observe that in this same time period both Auwae and, later, Wolfe, hired electricians. I have already noted the hiring of Cloud and Forsyth with the initial crew on December 7.[11] On December 29, a week after VanMeter's first approach to Auwae, two electricians were added to the crew, Langley and Brannan. Both were hired at $14 per hour, the same rate as E-1s Cloud and Forsyth. Yet the two new hires were carried, not as E-1s, but as ''electricians.'' On approximately January 11, another ''electrician'' was hired at the $14 rate, Wilkinson Jr. That was a little less than a week after VanMeter's second visit.

When Wolfe arrived, Cloud and Langley both left and Goodman was brought on. He, too, was a $14-per-hour ''electrician.''

It is not clear whether, despite their later arrival on the job, that Brannan, Langley, and Wilkinson Jr. were not part of Auwae's original crew. I note that Langley left with Auwae in late January. Moreover, gate hiring practices usually carry with it the connotation that the person actually standing at the gate is the one who is preferred over someone who is not, even if they have an application on file. And, there is no evidence that the openings which were filled by Brannan, Langley, and Wilkinson were actually open on either of the 2 days VanMeter appeared with his colleagues.

Wolfe, like Auwae, brought some of his own people aboard when he arrived, including Goodman. To some extent, they replaced those who had left. Even so, I observe that when two electricians left, Cloud and Langley, Wolfe replaced them with only one, Goodman.

D. *Some Factual Analyses*

I think it is fair to conclude that the Union's efforts here have been designed to either illuminate evidence of wrongdoing on the part of Bay, Inc. and BCS or to trap them into committing an act which is a provable violation of Section 8(a)(3) and (1). I certainly have no problem with the Union's attempting to obtain legitimate employment for its membership. Furthermore, I think it is appropriate for a union aggressively to seek to represent such employees once they have been so employed. Finally, I also think it is appropriate for a union to pursue the rights of the employees it represents under the Act. In the event that an employer is in fact engaging in violations of the Act, a union should bring them to the attention of the Board so that they may be appropriately dealt with. However, I am not so certain that it is appropriate for a union to lay traps for employers who are otherwise behaving lawfully. If a union does so, then one must also view carefully the verities and genuineness of the individuals who are engaging in that activity. At least one other administrative law judge has expressed a similar concern about such tactics. He believes unions who use such schemes may be misusing the Act and may be conscripting the Board into becoming an unwitting conspirator in an inequitable and wrongfully conceived trap. See Administrative Law Judge Harmatz' observation in *J. E. Merit Constructors*, 302 NLRB 301, 304 fn. 18 (1991). Certainly one should keep in mind that the Act is a shield, not a sword, for protected activity. In this sense I think it is fair to ask whether any of the employees who appeared at the BCS trailer and spoke to Mark Auwae on December 22, 1992, and January 6, 1993, were in fact legitimately interested in performing the electrical helper work. As seen below, one must be a legitimate applicant in order to be protected by Section 8(a)(3).

Unquestionably, the Union's filing applications, and seeking to obtain employment for its membership on November 9 and 10, was entirely proper, despite its obvious effort to also organize the project. If an employer has neutral hiring policies, presumably it will hire on the basis of skill and ability and in doing so would eventually hire union-trained employees who would be capable, if not more than capable, of performing work in their profession. Once employed, the employees have every right to seek to obtain a 9(a) relationship with the employer and their union.

I credit Roberts' testimony that Moore told him on November 10 that the Union intended to organize the job in the event that IBEW members were hired. Roberts, however, did not reply in a hostile manner. Instead, he advised Moore that such applicants would be welcomed and the Union was free to attempt to organize the project if it wished.

The fact that the employees were not hired thereafter is not ipso facto proof that there was a discriminatory motive involved. Keeping in mind that the project for which Roberts was seeking electricians was the aboveground project which never materialized, it is more likely to be true that the reason union members were not hired to perform electrical work is the same reason that no electrical workers were hired at that project: the project never materialized and the employment opportunities, at least through this Employer, never came to fruition. The job went to another contractor. It was that contractor who actually made hiring decisions for that project.

Yet the Union went further and returned on December 22 and January 6. It is here that the verities of the applicants come into question. On December 22, VanMeter and the others who came with him learned for the first time that BCS was not performing much journeyman electrical work. It also learned that BCS was hiring only helpers, some of whom might be characterized as electrical helpers. At that point the Union, through VanMeter, switched gears and decided to say, whether true or not, that the journeymen applicants wished to demote themselves to helpers, earning less than half their normal hourly rate in circumstances under which they could not demonstrate their actual skills. Many of the duties required of helpers transcended a specific craft. They were asked to perform rough carpentry work for the cement forms, install and connect reinforcing steel, insert empty con-

[10] The phrase ''journeyman electrician'' has at least two meanings. The first meaning is the dictionary definition: a worker who has learned his trade. The second is that it is a level of experience and skill usually acquired by undergoing an extensive apprenticeship period sponsored by an IBEW local union. In that sense it has come to mean an IBEW-negotiated job classification found nationwide in IBEW collective-bargaining contracts. On occasion, the imprecise usage of the phrase causes some lack of clarity.

[11] Actual dates of hire are somewhat imprecise. The payroll record uses Sundays as the end of a 1-week pay period. Thus, if a new name appears on that record, I have assumed that he or she was hired during that week. Based on the number of hours worked, I have ''guesstimated'' the day of the week that employee commenced work.

duit into the boxes which were being built, help pour and finish the concrete involved,[12] and help the equipment operator excavate and/or backfill the ditch as needed. Except for laying and attaching the conduit, these are not tasks which journeyman electricians normally do and are not tasks which they are trained to do.

When VanMeter was asked why the journeymen wished to perform helper work at less than half their normal wage rate, his answer was totally unsatisfactory. He said it was ''something they had decided they wanted to do.'' The only real explanation, of course, is that the Union wanted to place its members on the payroll of the contractor so that it could establish an organizing base. I do not have a problem with that as a general rule, but in circumstances where skilled employees decide to abandon their skills in order to get hired for that purpose, the decision seems to me to be quite contrived. I must question the legitimacy of that offer. Certainly it is a long reach to conclude thereafter that such individuals have not been hired simply because of their union membership. It is more likely they were not hired because they were not deemed to be bona fide applicants for the work.

However, it is probably not necessary to reach that conclusion. On December 22, VanMeter clearly attached a condition to the employment of these individuals. He told Auwae they would be willing to be hired on the condition that they be promoted to journeymen as soon as a journeyman job became available. In imposing that condition, VanMeter was attempting to change the Company's hiring rules. There is no suggestion that BCS ever agreed to those conditions or that it ever had policies in place which accepted the imposition of such a condition. So far as the record shows, BCS' policy was to hire inexperienced employees as helpers and to pay them accordingly. With respect to the more skilled personnel, it either trained them or hired them directly after demonstrating that they already possessed the skills. In fact, BCS (and Bay) had policies against hiring individuals who were overqualified for the position being sought. There is a great deal of testimony that Berry Contracting and its subsidiaries have had bad experiences with individuals who were hired for jobs beneath their skill level. As a result of those experiences it has developed a policy of not hiring persons in such a fashion. When VanMeter imposed that condition, he effectively withdrew and negated the applications themselves.

Even so, in the final analysis, there is no showing that there were any jobs available on December 22 or January 6. It is true that Auwae seems to have had the occasional need to replace a helper, and perhaps even add an electrician, but there is no showing that he needed them on either of those 2 days. He apparently did say that sometime in the future he might need ''employees'' because the job was suffering some delays. Yet, with respect to the latter observation, there is no showing that the employees who would be needed would be journeyman electricians. Moreover, there is always the possibility that higher management might permit the job to extend, using fewer employees rather than increasing staffing. That is an operational decision which undoubtedly would have been made at a level higher than Auwae. Indeed, Auwae shortly thereafter left Respondent's employment, apparently due to family considerations, and returned to his home in Hawaii. He was replaced by Larry Wolfe on January 20.

Wolfe, like Auwae before him, tended to favor employees who had worked for him before and also hired at the gate. He did engage in a certain amount of house cleaning and some employment opportunities did arise. There is no showing, however, that Wolfe was aware of VanMeter's presentations to Auwae.[13]

Wolfe testified that when he arrived, he allowed some employees the choice of leaving or working under his regime. Several chose to leave[14] and he hired replacements including a journeyman electrician named Martin Goodman, whom he knew to be a member of IBEW Local 390. One individual, Carl Hottendorf, who came aboard, listed as an E-1 electrician, was really on the job because he was a ''competent hole person.'' Bay, Inc.'s Bill Manley described Hottendorf as an OSHA-certified expert in excavation. Since it was appropriate for him to be doing other things when not inspecting the ditch, he was assigned as a helper tying rebar.[15] Furthermore, when Wolfe arrived on the site, since some employees chose to stay, he inherited a few of Auwae's employees including Vivian Bonin. As will be seen, infra, Bonin is married to a member of IBEW Local 479 and has made no secret of that particular fact. She continued to be employed through the end of April 1993 when she quit to take another job.

Finally, there is the unchallenged evidence of at least three individuals, Wolfe; Bay, Inc.'s project manager, Bill Manley; and Perritt that they had been told at the time they were hired they were to hire on the basis of skill and needs and not to concern themselves with the union membership of any applicant. The reason for the latter admonition apparently was because persons at the corporate level, specifically Roberts, were aware that the Port Arthur/Beaumont area houses the headquarters of several local construction unions. Roberts may well have been honoring his earlier statements to Moore that union applications were welcome to apply.

In reviewing the facts, together with the inferences which may reasonably be drawn therefrom, I fail to see that the General Counsel has made out the elements of a prima facie case. The Court of Appeals for the Fourth Circuit has recently described the elements of an 8(a)(3) violation in regard to a claim of an unlawful refusal to hire. It listed those elements as: (1) the employer is covered by the Act; (2) the employer at the time of the purportedly illegal conduct was hiring or had concrete plans to hire employees; (3) union animus contributed to the decision not to consider, interview, or hire an applicant; and (4) the applicant was a bona fide ap-

[12] Since this concrete was ultimately to be buried underground, the services of expert cement finishing was not necessary.

[13] There is some evidence that Wolfe did go to the Bay, Inc. trailer where Bay's personnel/safety man, Glenn Perritt, maintained application files. Most of them must have been those which came from the Holiday Inn, and therefore not electricians, as well as subsequent walk-ins. Perritt remembers that on three occasions Wolfe asked him for the applications of electricians which he had on file, but Perritt does not know what Wolfe did with them. Perritt thinks he processed six BCS employees for the purpose of offering them employment but has no recollection about who they were, or what jobs they were offered; nor does he know whether Wolfe utilized the applications in the Bay, Inc. file for the purpose of hiring them.

[14] Including Cloud and Langley.

[15] Though an E-1, Hottendorf's pay was $10 per hour, unlike the true E-1 electricians whose rate was $14 per hour.

plicant. *Ultrasystems Western Constructors v. NLRB*, 18 F.3d 251 and citing, inter alia, *J. E. Merit Constructors*, supra at 303–304.

To the extent there is any question about any specific element, for the most part Respondent BCS has demonstrated the reasonableness of its actions. First, it is clear that both Respondent Bay and Respondent BCS were aware of the Union's efforts to land jobs for its members and that the Union intended to organize not only Respondents' portion of the Big Three Project but other portions of it as well. However, the element of union animus is missing entirely and, in the case of connecting the applications to a concrete job offer, that element is inconclusive.

Animus, of course, has not been demonstrated in the foregoing scenario at all. In fact, one journeyman electrician, Goodman, hired by Wolfe, was known to be a member of an IBEW local, although not the Charging Party. Moreover, one of BCS' helpers, Bonin, is an IBEW wife and a strong supporter of the IBEW. She was among the persons initially hired and has remained employed throughout. She testified she was treated no differently then anyone else. At the very least that demonstrates that BCS has no particular concern about whether an employee is a union member or is closely connected to a union member. Nor can one conclude that it harbors union animus from the manner in which it treated the 140 I&E applicants. The evidence clearly shows that the I&E portion needed to be bid carefully and if Respondent was using the applications as part of its research into the labor costs to be included in such a bid, that seems harmless enough. I know the General Counsel is skeptical of that version, but two different company officials so testified and both also testified that it is a practice which is not unusual in the nonunionized portion of the construction industry.[16]

Furthermore, the General Counsel has not shown that the 75 or so electricians supplied to Bay, Inc. by the Union were treated any differently than the 70 or so who were not. There is no showing that any of the 140–145 applicants, whether union or nonunion, were hired. In fact BCS treated all 140 applications in exactly the same way. Dudley put them in a file folder and placed them in his desk. When he became disabled and unable to perform his duties anymore due to illness, all 140 applications became equally lost. Moreover, since those applications were aimed at the aboveground bid (the long-term project), Auwae's and Wolfe's ignorance of them in regard to project IE-429 is not evidence of discriminatory motive. Certainly their authority to hire at the gate for their smaller and thought-to-be short-term project, is also a neutral circumstance.

Insofar as timing is concerned, the General Counsel has failed to demonstrate, indeed the evidence shows to the contrary, that there were actual jobs available at the time any of the electricians presented themselves. As previously noted, the aboveground project never materialized and IN-405 did not utilize any electricians. IE-429 was generally fully manned, either from a superintendent's following or by gate hires. The General Counsel has failed to point to a single opening on December 22, 1992, and immediately thereafter, or January 6 and immediately thereafter, for which an IBEW journeyman would have been suited. The only jobs which were occasionally available were the helper jobs and we have previously discussed Respondents' policy against hiring overqualified personnel. Indeed, the General Counsel's brief is silent on the question on what sort of journeymen openings existed and when. Gate hiring, of course, generally means qualified individuals who appear at the gate at the right time are the ones who are hired. The General Counsel has failed to show that any official of Respondent BCS deviated from that practice or somehow disfavored those who were involved in the Union's efforts. One cannot simply assume, as the General Counsel does, that a failure to hire employees with a union background is based on that background. That is particularly so when some of those applicants are manipulating their expressed desires, reducing their request from journeyman electrician to electrical helper. Accordingly, as of January 6, 1993, there is no credible proof that BCS had a policy designed to avoid the hiring of union members or union sympathizing employees. Indeed, the only hint of that comes in the next section involving Susan Duhon.

E. *Susan Duhon*

At the time of the transaction to be described below, Susan Duhon had been unemployed for approximately 3 years. Her last employment had been for a firm called Analytical Medical Enterprises. Her resume describes her job responsibilities with that firm, for whom she had worked about 2 years, as ''general office work: typing, filing, answering phones; payroll, assisting in hiring nurses, keeping nurses' records current.'' Prior to that she had served as an assistant bookkeeper/rental manager for a property management firm and before that as a billing clerk for a leasing corporation.

Duhon, like many others, had seen the November ad and had responded to it by going to the Holiday Inn on November 9. She filed an application at that time seeking a ''clerical'' job and attached her resume describing her work experience. As noted below, the jobs in question went to others. On January 21, 1993, she filed a second application for employment at the jobsite seeking the position of ''secretary.''

At the time of her second application, Bay, Inc., in the performance of the IN-405 project, had several administrators employed at the site. These included Bill Manley, the project manager; Patti Davis, the office manager; and Lauren Oakes, the timekeeper/assistant office manager. Bay's industrial division manager, Luther Young, testified that he had interviewed Davis at the Holiday Inn in November and that Berry Contracting's human resources director, Bill Carlin, in Corpus Christi knew her and recommended that she be hired. She was initially hired as the timekeeper but almost immediately became the office manager. Oakes in turn became her assistant/timekeeper. When Davis left sometime in January, Oakes became office manager/timekeeper. She rather quickly advised Manley that she could not perform both duties at the same time and needed an assistant. Manley agreed and decided to take action in several directions in an attempt to find a suitable assistant.

According to Duhon, sometime on February 11 or 12, her friend Vivian Bonin, advised her that the timekeeper's job was open. Bonin was then employed by BCS on the site as an electrical helper. In response to Bonin's tip, Duhon went

[16] Obviously in the unionized portion of the industry, wages are often fixed by master collective-bargaining agreements covering wide geographical areas. Access to the contract alone would be sufficient to assist a bidder. That is not true where there is no single document which can be researched. Primary research into the marketplace is well within the realm of probability.

to the jobsite a second time on February 12 and filled out her third application. It was the first in which she actually sought the job of ''timekeeper.'' Again, she attached her resume to the application. She also spoke to Oakes.

Duhon says Oakes advised that she ''would take the application. [But] there was nothing she could do about it because her boss was out-of-town, but she would be in touch with [Duhon] the first of the following week.''

In fact, the day before, Thursday, February 11, Manley had indeed gone to Corpus Christi where, among other things, he began pursuing names of appropriate candidates for the opening. On the day he arrived in Corpus Christi he spoke with fellow Manager Doug Lanier asking him for suggestions. Manley knew Lanier had worked in the Beaumont/Port Arthur area for a long time. Manley says that Lanier suggested Sue Ellen Atchley because Lanier had formerly worked with that individual. Atchley, like Duhon, had earlier filed an application in November at the Holiday Inn. It is not clear whether that filing was known to Manley or Perritt by the time Manley returned to the jobsite late Monday morning, February 15.[17] Manley says he asked Perritt to pull Atchley's application so apparently there was some knowledge about it. Later, Atchley was asked to fill out a second application and she did so on Thursday, February 18.

In the meantime, early on Monday, February 15, and before Manley returned to the site, Oakes began to move rapidly. It appears from the testimony of both Manley and Young that Oakes did not have the authority to hire anyone. She was a recent hire herself and Manley had not specifically authorized her to go forward.[18] Nonetheless, according to Duhon, early Monday morning Oakes telephoned her leaving a message on Duhon's recorder. When Duhon responded, Oakes told her to come down to the office. Duhon arrived about 9:30 a.m. At that point Oakes told Duhon, ''Let's get the employment papers filled out.'' As a result, a number of documents were completed. These included a conditional job offer,[19] a drug test consent form, and W-4 and I-9 forms. Oakes even gave Duhon an employee number. Normally that was not done until the end of the hiring process, but the number was easy to determine because it usually consisted of the last five digits of the individual's social security number.

Oakes then took Duhon to see Glenn Perritt in a nearby trailer. Oakes explained who Duhon was, asking whether Perritt could get Duhon the drug test ''before noon'' so she could begin work that afternoon. Perritt replied that he could not; the earliest Duhon could go to work would be the next morning.

Oakes then left and Perritt, after conducting some other short business, proceeded to ask Duhon additional questions. During that interview he asked her to perform some minimal physical exercises to complete the ''physical assessment'' requirement. During their discussion he learned about some surgery which Duhon had had, also learning that it was work related. She says he asked only for her release date. Although not particularly important, I am not certain that her memory is correct. It seems likely he would immediately ask her for a copy of the medical release. Clearly, he did so a little later.

Nevertheless, she testified that he sent her back to Oakes to obtain the drug test requisition form. After getting it both Oakes and Duhon returned to Perritt's office. When they arrived Perritt was on the phone and Duhon could discern that the conversation Perritt was having related to her. She handed Perritt the form but he signaled her to take it back. It was at that point she says that he asked for a copy of the medical release and then asked whoever he was talking to on the phone if she should get the drug test before or after submitting the doctor's release. After ending the call, Perritt asked Duhon whether she could get the release; he agreed to let her call the physician for a copy of the form. She says Perritt remarked the sooner she could get it, the sooner she could take the drug test. At that point it was about 11:30 a.m. She left to get the release and returned, it would seem, less than an hour later. She attempted to give it to Perritt, but he referred her to Oakes, saying that Oakes would need to make a copy. She took it to Oakes' office, but Oakes was not there. While she waited for Oakes to return, Perritt came in. About that time Oakes appeared, was given the release, and left to make the copy.

During those moments, she says, Perritt came over and said to her ''in a low voice,'' ''Manley wanted me to ask you if you are aware that there is a picket line up on the job.'' She said she was; then he asked her whether she would have a problem crossing it. She replied she had been taught to respect picket lines, but realized she was an office worker, not a craftsperson and would have no trouble crossing. Then she says Perritt started to leave but turned and asked her if her husband was a union member. She replied that he was and testified that he then asked ''Which union?'' She told him, ''The Electrical Union.'' She says Perritt then left the trailer. A few moments later Oakes returned and went to her desk. Duhon asked if she was getting the drug test form.

She says Oakes asked her if she could return between 1 and 1:30 p.m. Duhon then asked if she was going to take the drug test right then, to which Oakes replied ''No, we have run into a problem and we have got to work something out.'' As a result, Duhon went home. Oakes called her at home about 12:45 p.m. advising that corporate headquarters had told her to hold off on hiring anyone for the position. Duhon asked if it was because her husband was a union electrician. Duhon then testified about Oakes' response: ''She stammered and stuttered, and said that she had no idea that he was, but no, she didn't think that it did.'' At that Duhon says she told Oakes that she ''knew that Mr. Manley and Mr. Perritt knew that he was.'' She then asked Oakes to give a message to Manley: to tell him that she would not have trouble crossing a picket line; that she owed her loyalty to the company that she worked for and that she had worked enough to know the meaning of the ''confidentiality''; that if he would give her half a chance she knew she could do the job. She says Oakes replied, ''I'm sorry Susan. I am only doing what I am told to do.''

It should be observed here that Duhon's reference to Manley, and the state of his knowledge, is a bit remarkable. Duhon had never met Manley and it is unlikely that she

[17] The Corpus Christi headquarters may have maintained copies of the November 9–10 applications, including Atchley's.

[18] Oakes was not called as a witness.

[19] Making conditional job offers appears to be a new practice triggered by the Americans with Disabilities Act. Such an offer is believed to allow employers to ask in detail about physical conditions an applicant may have without risking violating that law.

knew his name, despite her above testimony in which she says Perritt made an oblique use of Manley's name. The only person to whom she had spoken besides Oakes was Perritt. Furthermore, when Perritt was on the phone, under her version, he appeared to be speaking to a personnel officer asking advice about the order in which to process some of the paperwork. That is not something about which Manley would have been advising Perritt. I believe there is no supportable suggestion that Manley's name or his position was mentioned or that Duhon had come to know them.

Duhon went on to testify that later that afternoon she received a telephone call from an individual who identified himself as Bill Manley. She says he apologized for any inconvenience that she might have been put through, explaining that Oakes did not have the authority to do what she had done. He also told Duhon he had tried to reach her at Perritt's trailer earlier, before she had gone to Beaumont (apparently to obtain the doctor's release). He went on to say that Oakes had indeed transmitted her message to him. He asked to confirm that Duhon had told Oakes that she believed she hadn't gotten the job because her husband was a union electrician. When Duhon confirmed that belief, she says he ''kind of laughed,'' and went on to say, ''Oh no, Ms. Duhon; what a spouse does is of no concern to me.'' She again asserted that she knew the meaning of the word ''confidentiality'' and that she could do the job if he would just let her. She says he responded that she was ''really overqualified'' for the position; that he needed a timekeeper. She asserted that her resume demonstrated experience in that role, as she had kept payroll records on the nurses in her previous job. She says he responded that what he needed was an ''experienced construction timekeeper, experienced with heavy turnaround.'' She denies that he told her he had someone else in mind for the job.

She agreed on cross-examination that she did not accept his assertion that she was ''overqualified,'' but acknowledged that she had never worked as a timekeeper in construction before and was not familiar with the procedures. Furthermore, to the extent that the timekeeper job required the incumbent to be an assistant office manager or to fill in for the office manager as needed, she acknowledges that her application does not show any office manager experience whatsoever. On the stand, she asserted that the phraseology on her resume, ''secretary'' when she worked for Analytical Medical Services, really meant that she was the office manager for that business. Even if that is so, her resume's language does not necessarily lead one to that conclusion.

On cross-examination, she asserts that no one (apparently meaning Oakes) told her what the duties of the timekeeping job would require. She was, therefore, unaware that the job required the timekeeper to perform certain part-time office manager duties.

It will be recalled that Duhon had filed her application based on a tip which came from Vivian Bonin, a BCS electrician's helper. There is no showing how Bonin came to know that there was a timekeeper's job open at Bay, Inc. In January she had spent a few days working in the BCS office. Her experience in the office gave rise to some curious testimony.

Bonin was hired by Auwae on December 14, 1992, and worked until April 30, 1993, when she left to go to work for another construction company. About January 20, Larry Wolfe took over as the BCS I&E superintendent for the departed Auwae. Bonin had suffered a nonwork injury to her hand and Wolfe knew she was unable to work in the field for a few days. He was attempting to acclimate himself to the office and to determine what sort of filing system needed to be put in place. He asked the injured Bonin if she would work in the office and help him organize it. She remembers he ''pulled her in'' to the office on a Tuesday or Wednesday afternoon, but did not testify for how many days she remained in the office. Her duties in the office mainly involved filing, including putting blueprints together and trying to make sense of the filing system, particularly the filing cabinet which held purchase orders.

She said at one point, a friend of hers named Glenn Larkin came to apply for a job. She went to the filing cabinet to obtain an application blank for him. After he had filled it out she took it to the file drawer which contained other completed applications. As she put it with the others, she noticed another file folder in the back which had a yellow plastic tag labeled ''union applications.'' She testified inconsistently about what she observed and/or knew:

> Q. [By Mr. Martin] Do you know which crafts were in those folders?
>
> A. Sir, it was only electrical.
>
> Q. How do you know that?
>
> A. Because that is all of the applications that were ever brought—that was the only applicants that came to our trailer.
>
> Q. No, madam. I am asking you how you knew what was in the file. Not what you were experiencing in terms of applications that came to the trailer.
>
> A. Well, I don't know the answer to that, then.
>
> Q. You don't know which crafts were in that folder?
>
> A. No.
>
> Q. It could have been electricians, or it could have been other crafts as well, couldn't it?
>
> A. That would be speculation, I can't answer to that.
>
> Q. You just don't know, do you?
>
> A. No, Sir.
>
> Q. Do you know if any persons were ever hired from that file?
>
> A. They were not, sir—not as long as I was there.
>
> Q. How do you know?
>
> A. Because I saw the names on the applications.
>
> Q. You saw them all?
>
> A. The first couple of them. I am familiar, I do know quite a few members of the local union. I would have known if they had been out on the job.
>
> Q. And—if they were a member of another union and they were employed in the underground work at Bay Control? Would you know that?
>
> A. Only if they told me.
>
> Q. Right. So they could have been in that folder and hired as a union applicant, and you wouldn't have known if they came from that file. Is that true?
>
> A. Could have, yes.

An analysis of Bonin's quoted testimony discloses her improbity. She is clearly willing to embellish whenever she thinks she can, even as the embellishments become clear. On direct examination counsel for the General Counsel simply asked her to describe what she had observed in the file draw-

er. She replied she had seen a file folder with a yellow tab labeled ''union applicants.'' He did not ask her to go further. Respondent, however, did.

On cross-examination, she said, as a factual matter, that the file contained the applications of only electrical craftpersons. That answer suggests she did more than simply observe the existence of the file, that she must have looked in the folder to see what it contained. But the next question, asking her to tell how she knew the applicants were electrical, drew the answer: ''[T]hat was the only applicants that came to our trailer.'' That answer, and its followup, gives her away.

First, her response fails to meet the thrust of the question; it avoids a direct answer. Second, she has backed away from her suggestion that she actually knew the applications in the file were from electricians; now she concedes that she was making an assumption that they were electricians because she somehow knew that only electricians had come to the site to make application. Simultaneously she must also be conceding that the file may have contained applications of persons other than electricians, because she must realize her assumption might not be accurate. Therefore, she has backed away from her earlier testimony that the file contained ''only electrical.'' Third, by saying that electricians had come to the BCS trailer, she seems to know about VanMeter's presentations of December 22, 1992, and January 6, 1993.[20]

When counsel, recognizing that she had not answered his question, continued to ask how she knew what was in the file, she conceded she didn't know, that she was only speculating. That acknowledgment, of course, requires a finding that her testimony cannot be relied on. Yet, despite her concession that she didn't know who or what was in the file, undaunted, she asserted that she knew that the persons in the folder had not been hired. That, of course, is illogical. If she didn't know who was in the file, she couldn't very well have known who was or was not hired from the file. Apparently recognizing her inconsistency, she reverses herself again, claiming she had seen some names, ''at least the first couple of them.'' That is clear embellishment. Even so, that effort is illogical because she goes on to say that the reason she knows persons were not hired from the file is because she is able to recognize the names of most of the IBEW members. Assuming that she can recognize the names of most of the 700 working members, that fact still does not explain how she knew persons from the file were not hired. She never knew who was in that file. She didn't even know whether there were any IBEW names in that file. The two or so which she now claims she saw were not identified either by name or by union affiliation.

It is quite clear that this witness has dissembled while describing this file.

It gets worse. Bonin says that the first person she told about observing this file was Duhon, but not until about 2 weeks after Duhon was turned down for employment in mid-February. She supposedly mentioned it to Duhon several more times thereafter. She also says she reported it to Chris Kibbe, a union field organizer. She could not remember when she told Kibbe, saying that it occurred ''when all the trial was put together and it was decided that everything would be—there would be a hearing in all of this. . . . They decided to combine both these cases together at some point in time. Was it April or May, maybe even June? . . . That is when I talked to them [sic] about it.''[21] Neither Duhon nor Kibbe was asked to corroborate Bonin on the point.[22] What is clear, however, is that Bonin did not tell anybody from the NLRB about it until a week before the hearing. At that time she advised counsel for the General Counsel who learned of it for the first time. She did not give a prehearing statement to any Board agent.

Respondent offered contrary evidence about the existence of such a file and the General Counsel obtained a denial from Wolfe. The witness most familiar with the site office paperwork, specifically the application files, was Perritt. He maintained those files for Bay, Inc. and has some working knowledge of files maintained by BCS. He testified that he had never seen any file or file folder marked ''union applications.'' Similarly, Wolfe said he did keep some applications on site at the BCS trailer, but they were not separated in any way.[23]

Frankly, I do not find Bonin to be worthy of belief. She is clearly a witness of convenience. Her claim that a file folder existed labeled ''union applications'' is simply an after-the-fact effort to bolster a thin case. She is either attempting to give aid and comfort to her good friend Duhon, a scenario I believe to be the most likely; or is demonstrating solidarity with her husband's union. It is simply made of whole cloth and must be rejected outright. If she had really seen such a file in January as she said, she would not have waited until 2 weeks after her friend Duhon was turned down for the job to inform Duhon about it. She had tipped Duhon to the job. Moreover, had Duhon really been aware of it and, according to Bonin, she repeated the story to Duhon several times thereafter, Duhon would have promptly informed the Union or a Board investigator, yet she did not. It is undoubtedly true that the General Counsel did not ask either Duhon or Kibbe to confirm Bonin's story because neither could have done so. Bonin's effort to enhance the case must be rejected. Specifically I find that her testimony about the existence of a file labeled ''union applications'' is false. Therefore, no union animus can be inferred from or found in Bonin's testimony.

In making that finding, I do not reject out-of-hand the remainder of the General Counsel's case with respect to Duhon. Certainly Duhon's situation requires Respondent Bay to explain itself further. In this regard, both Perritt and Manley have recollections different from those of Duhon.

[20] Her knowledge of VanMeter's activities on those dates seems most unlikely unless someone had told her about them. She was an electrician's helper who usually worked on the construction site away from the trailer. It is unlikely that she observed VanMeter and his colleagues herself or could discern what they were doing even if she saw them. One possible source of knowledge would be a union member or official; another might have been Auwae. Whatever her source, it was secondhand knowledge.

[21] The order consolidating cases was issued on June 2, 1993.

[22] Duhon testified after Bonin and Kibbe were called at the rebuttal stage.

[23] Of course Bonin says she saw the file during the very beginning of Wolfe's tenure. If so, it must have been created by Auwae. Is she saying that Auwae had created the folder because VanMeter had given him copies of the earlier applications? If Auwae did so, can one assume they had been segregated for nefarious reasons? Or, did Auwae set them aside for handy reference? Her testimony gives no clue to the answer to those questions.

Manley testified that one of the things he did to search for candidates for the timekeeper's slot, besides speaking to Lanier, was to ask Perritt to pull the clerical applications which Perritt had on file at the site. Curiously, he acknowledges that he never really looked at those which Perritt retrieved and put on his desk.[24] Nonetheless, Manley was well aware of the culture and hiring preferences which his company followed. He knew that all the Berry Contracting, Inc. subsidiaries give preference for hire to satisfactory employees who have worked for one of them previously. They also give preference to individuals who are known by managers to be competent and on whose recommendations other managers can rely. Furthermore, Manley was well aware that construction experience was a primary factor in hiring a clerical because an experienced employee did not need to undergo much training.

Accordingly, having received the recommendation from Lanier regarding Atchley, the first thing he did on Monday morning when he turned his attention to the matter was to ask Perritt for Atchley's application. That he did so, given Respondent's policies and practices, can hardly be considered unexpected.

He was not aware that Oakes and Perritt were processing Duhon's application. He had not authorized Oakes to proceed on the matter and his own actions have to be characterized as the initial actions of the person who was going to be making the decision. Oakes' maneuvering was not.[25] Thus, when Perritt informed Manley that Oakes was processing another candidate for the job, Manley needed immediately to deal with that issue. Manley says at the time he called Perritt to ask for Atchley's application and learned about Duhon, he asked that Perritt hold off on Duhon because he had not reviewed her application. Furthermore, he had not given Oakes any instructions on the question and had not even given her permission to interview anyone. Perritt recalls that Manley asked him to stop the interview and to hold up on hiring Duhon because he wanted to look at other applications. Perritt also remembers Manley saying at the same time that it ''might be a good idea to ask if these applicants would be able to cross a picket line to go to work.''

Perritt says he then asked Duhon if she would have any problem crossing the picket line to come to work, explaining that there had been, within the last few days, and weeks,[26] a sporadic picket line established by some construction unions.[27] He went on to tell her that there had been some damage to some automobiles which had been kicked and hit and that it was possible that Bay's employees might have to come to work an hour or so late,[28] after the pickets would have left.

Perritt says Duhon replied that she didn't personally have a problem, but observed that her car was registered to her husband, an IBEW member. It was traceable to him through the license plate number. Perritt says she told him she needed to ask her husband if he had a problem with her crossing such a line. He says he told her that she ought to check with her spouse and get back to him after they had discussed it.

Perritt agrees that a few moments later he took Duhon's entire ''package'' to Manley and did in fact report her answer to him. He also told Manley that he had advised her that they were going to hold off on hiring her, but in the meantime she would check with her husband about his possible concern over the picket line.

At that point Perritt says Manley telephoned Human Resources Director David Carlin in Corpus Christi. Manley, with Perritt present, asked Carlin whether they were bound to honor the conditional job offer which Oakes had extended to Duhon. He says Carlin asked him if Duhon was qualified. Manley advised that she was, but that Atchley seemed to have more construction experience and could double as office manager. Carlin replied they were not bound by the conditional job offer.

In addition, Manley mentioned that Duhon's husband was a member of the IBEW. Carlin asked how they had found that out and Perritt told him he had asked her about crossing the picket line and learned it as she explained her husband's possible concern. At that point Carlin said he was going to leave the decision in the hands of the project manager.

Manley says at that time he did not know what he was going to do. He obviously had not yet made a decision because he had not had the opportunity to determine whether Atchley was available. Both he and Perritt agree that Duhon probably could have served in the capacity. Yet Atchley's background was clearly superior to Duhon's. Perritt called Atchley on February 16 and ascertained that she was available to work. She later filled out a fresh application form on February 18 and was hired.

After Manley made his decision, he telephoned Duhon at her home. He says he advised her that he had hired someone else and he was sorry for the inconvenience, but that they would keep her application on file.

Manley denies Duhon's testimony that he ever told her she was ''overqualified.'' Instead, he says, he told her that she did not have construction experience and her background was really not suitable for the job. He says he advised her that the person he had found was someone who had considerable experience in construction timekeeping and construction practices. I credit him on this point. Duhon's claim to the contrary is, I find, unnecessary embellishment. She was definitely not overqualified and there was no reason for Manley to misstate his reason for choosing someone else, even if he had another secret, but illegal, motive.

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[24] At least one of those, Rose Marie Mullins, who had filed an application on February 10, probably warranted a closer look.

[25] It should be observed here that Respondent, in its answer to the consolidated complaint, admitted that Oakes was a supervisor within the meaning of Sec. 2(11) of the Act and an agent within the meaning of Sec. 2(13) of the Act. It does not follow from that admission that she had the authority to hire or fire.

[26] From an extrapolation of testimony, I find the picketing began in early February. It lasted for 3 or 4 weeks, including the days when Duhon was under consideration.

[27] Although the record does not conclusively establish which union(s) established that picket line, it seems that they were construction unions other than the Charging Party, and it was directed at contractors who were working at the site other than Bay, Inc. or BCS.

[28] Perritt testified that both Patti Davis and Lauren Oakes had earlier advised that they did not want their cars kicked in. As a result he and Manley had a few discussions about whether they should park their vehicles at a nearby grocery store to permit Manley to drive them in together in his large Chevrolet Suburban. The record does not establish that he advised Duhon of this thinking in any detail.

Manley remembers that Duhon asked if he was not hiring her because her husband belonged to the Electrical Workers Union. He says he replied, ''No, I did not know your husband was a member of the union. It doesn't have anything to do with my decision on hiring you. I believe we have union people working out here for us at this time.'' He says that they continued talking but he does not recall what else was said except he remembers telling her he was not looking for someone to train, that he needed someone who was thoroughly experienced; that this was a ''fast track job.''

I should observe here that Manley was being somewhat disingenuous with Duhon. In fact he did know by then that Duhon's husband was an IBEW member. Perritt had so reported it to him and they had discussed the situation with Carlin on the telephone. Nonetheless, it appears that Manley's assessment of the relative experience of the two applicants is correct. Atchley had worked in various clerical capacities with construction firms between 1988 and July 1992. Furthermore, she had the specific recommendation of a fellow Bay, Inc. manager who had worked with her in the past.

IV. ANALYSIS AND CONCLUSIONS

In the foregoing factual section, I have already performed a certain amount of credibility and factual analysis. Specifically I have determined that the IBEW's journeymen electricians were not bona fide applicants for the electrical helpers' job. And, it appears that they wished to impose conditions of their own on the hiring decision-making process which Respondent BCS was not obligated to accept, i.e., the applicants' requests to be hired as helpers on the condition that they be promoted to journeyman electricians when such openings appeared. Additionally, there is virtually no evidence that any journeyman electrical positions were available at the time the offer was made. Therefore, the inference of animus which the General Counsel wishes me to draw under *Fluor Daniel*, 304 NLRB 970 (1991), is not appropriate here. The circumstances are simply too ambiguous. Thus, the General Counsel has failed to demonstrate by credible evidence that Respondent Bay did anything improper with respect to the I&E applications which were taken at the Holiday Inn on November 9–10. There is nothing to contradict the testimony that those applications were taken for the purpose of researching the labor market to make an intelligent bid on the aboveground portion of the work and the aboveground portion of the work never materialized, for BCS' bid was unsuccessful.

Therefore, aside from the discredited testimony given by Bonin, none of the elements of a prima facie case is present. The element of union animus is missing because Bonin's testimony cannot be relied on. Accordingly, I conclude that the General Counsel has failed to prove that Respondent has a policy of refusing to hire employees with a union background.[29]

With respect to Duhon, it is appropriate to first determine whether the element of animus is present. The General Counsel specifically relies on the incident in which Perritt inquired whether Duhon would cross the picket line of a stranger union and his learning that Duhon's husband was a union member to conclude they were factors in Manley's decision not to hire her. I do not concur.

First, it is quite clear that the question regarding the picket line would not have come up had the pickets not been engaging in rough activity. The line was directed at other employers. It is undisputed that the pickets in question had recently engaged in boisterous conduct resulting in property damage. Automobiles had been kicked and struck as they crossed the picket line. This had engendered a certain amount of fear within Respondent's office staff. It is also undisputed that Superintendent Manley and Safety/Personnel Officer Perritt had discussed the best way to offer employees a safe passage. Tentative plans been made to allow office workers to come in late and to offer them a ride in Manley's private vehicle from a nearby grocery store. Obviously, employee safety was on Manley's mind.

It is true that there is a credibility discrepancy between Perritt and Duhon over whether Perritt described the risks at this picket line. Nonetheless, it seems to me that Perritt's version is somewhat more credible than Duhon's. It will be recalled that Perritt testified that he was reminded to ask Duhon about her willingness to cross such a line shortly before he actually asked the question. He says that he did inform Duhon about the risk, although he is not certain exactly how far he went with that information. He observes that it was in response to his mentioning the risk of property damage that Duhon advised him that her car was registered to her husband, a union member, and she needed to discuss the circumstances with him first.

Under her version, Perritt's question regarding her willingness to cross the picket line was unaccompanied by any explanation. That seems unlikely given the nature of this picket line. I observe that it is the legal responsibility of employers to provide employees with a safe place of employment. If they fail to do so, and injury results, the employer may be liable for not informing the employee of the risks. It seems most likely therefore that Manley wanted Perritt fully to advise this prospective employee of a risk of danger so that she could make an informed decision about whether she wanted the job. Therefore, I cannot credit her recollection that Perritt said nothing about the reason for his question.

Accordingly, I find as a factual matter that Perritt did inform Duhon of the risk of the picket line and was simply asking whether that risk was acceptable to her. In that circumstance, I cannot see where a Section 7 right has been abrogated. For any interrogation, under the rule of *Sunnyvale Medical Clinic*,[30] to constitute a violation of the Act, it must be coercive and have the object or result of causing an employee to abandon rights guaranteed under Section 7 of the Act. Even before the Board's decision in *Sunnyvale*, asking an employee about his or her intentions in the event of a strike was not prohibited outright. If the inquiry had a legitimate purpose, such as assisting the employer in determining

[29] In this regard, I do note that there is after-the-fact evidence that union electricians and pipefitters have been hired. I do not concern myself with the evidence and testimony covering October 1993 to the effect that Respondent BCS hired some electrical helpers acquired through the Union. That incident occurred well after the matters which are the subject of the complaint and are therefore subject to possible manipulation. It is an entirely collateral matter. Accordingly, it is not a proper part of this case.

[30] 277 NLRB 1217 (1985).

whether he can remain in business during a strike, the question was considered lawful and permissible. *Industrial Towel & Uniform Service*, 172 NLRB 2254 (1968). That test for lawfulness was subsequently refined in *Mosher Steel*, 220 NLRB 336 (1975). There, the Board, citing *Industrial Towel*, supra, stated its rule: ''[Q]uestions about employee strike intentions are not per se unlawful but must be judged in light of all the relevant circumstances.'' Following that rule, and preceding *Sunnyvale* by only a few months, the Board in *American Thread Co*., 274 NLRB 1112, 1113 (1985), held a single, isolated question to a job applicant during a period of contract negotiations about whether he would cross a picket line in the event of a strike not to be a violation. Implicit in that decision is the requirement that there be evidence of coercion. A few months later, in a different context, the coercion requirement became explicit in *Sunnyvale*.

Coercion cannot be found here. Perritt had no intention of coercing Duhon from engaging in a Section 7 right, only to inform her of circumstances regarding her work which might make her uncomfortable—a risk of damage to her vehicle or to herself in the event the picket line continued to be rough. She responded by saying she needed to discuss the risk with her husband, hardly the response of someone being denied a Section 7 right. Compare the employee's response in *American Thread*. Accordingly, I find this questioning to be noncoercive and therefore not violative of the Act; nor do I find it to be evidence of union animus.

Furthermore, it seems more probable that Duhon would respond to Perritt's question concerning the picket line by reviewing with her husband any problems that he might have. That in itself would inform Perritt that her husband was a union member, yet its revelation was simply an incidental answer to his lawful question. Therefore, I do not find that Perritt coercively interrogated her about her husband's union membership. Nonetheless, the issue of whether Respondent utilized that knowledge in its decision-making process remains open.

I shall, for the purpose of analysis here, assume that Respondent did take that information into consideration as it analyzed the appropriate candidates to be selected. I observe in that regard that there is no question that of the two candidates, only one had a significant working history in the construction industry: Atchley, not Duhon. Furthermore, Atchley had the benefit of having been recommended by Manley's fellow manager. She was a reasonably well-known quantity. Duhon had never worked in the construction industry and would have required a certain amount of training which Atchley would not need. Finally, Atchley had a demonstrated office manager background while Duhon did not, at least according to her own resume. All these factors clearly favored the selection of Atchley.

If one assumes that the General Counsel has made out a prima facie case with respect to Respondent's decision not to hire Duhon, under the *Wright Line*[31] rule, the employer may successfully defend by establishing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra at 1089. In this regard, I think it is clear that Respondent Bay has demonstrated that it would have made the same decision that it did even with the knowledge that Duhon's husband was a union member. First, I observe that Bay, Inc.'s sister, or operating arm, BCS, already employed one person whose spouse was known to be a union member. That was Vivian Bonin and, while it may be true that Bonin's circumstances were a bit different since she actually worked for BCS and since she was already on board when she announced her husband's membership, she acknowledged that no one treated her any differently once that fact was known. Second, that sister had hired at least one union journeyman, Goodman. Therefore, union membership considerations do not appear to exist. Third, it is likely that Manley was a bit miffed at Oakes for having proceeded into the hiring process without him. He certainly wanted to have input over who was hired and did not want to be rushed by the newly promoted Oakes. Finally, Atchley was, without question, the superior candidate. She was fully experienced and needed no training. Duhon, objectively, did not offer even an equal background. Accordingly, assuming the General Counsel has made out a prima facie case regarding the rejection of Duhon as an applicant, I conclude that Respondent Bay, Inc. has fully rebutted it.

CONCLUSIONS OF LAW

1. Bay Control Services, Inc. and Bay, Inc. are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that either Bay Control Services, Inc. or Bay, Inc. has engaged in any violations of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The complaint is dismissed in its entirety.

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[31] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); also *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.